NO. 84148-9

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

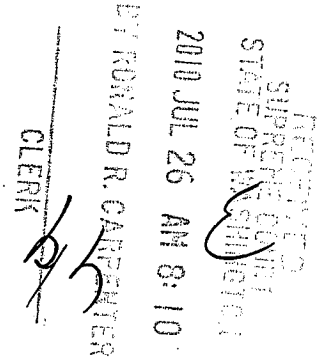
STATE OF WASHINGTON,

Respondent,

v.

MICHAEL TYRONE GRESHAM,

Petitioner.



SUPPLEMENTAL BRIEF OF RESPONDENT

MARK K. ROE
Prosecuting Attorney

KATHLEEN WEBBER
Deputy Prosecuting Attorney
Attorney for Respondent

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES

I. ISSUES

1. RCW 10.58.090 permits the trial court to allow evidence of a prior sex offense in a prosecution for another sex offense "notwithstanding ER 404(b)" if the evidence is not inadmissible under ER 403. Does this statute violate the separation of powers doctrine?

2. Does application of RCW 10.58.090 to an offense which was committed before the statute was adopted violate either the State or Federal ex post facto clause where the statute regulates the character of evidence that may be considered by the trier of fact, but does not change the quantum of evidence necessary in order to support a conviction?

II. STATEMENT OF THE CASE

The facts of the case have been outlined in the Brief of Respondent and in the decision of the Court of Appeals. The defendant, Michael Tyrone Gresham, was acquainted with J.L. through his wife's friendship with J.L.'s mother. Through this friendship J.L. stayed at the defendant's house on multiple occasions when she was between the ages of 8 and 11. On one occasion the defendant babysat J.L. and her sibling at her home. On many of these occasions the defendant had sexual contact with

J.L. Brief of Respondent at 1-5. J.L. only told her mother about the molestations when she was 12, but not in great detail. BOA at 5. The offenses were reported to the authorities after J.L. revealed these crimes on a drug and alcohol evaluation questionnaire when she was 14 or 15 years old. BOA at 5.

The defendant had previously been convicted of Assault 2nd degree with sexual motivation. The offense occurred in 1992 against 9 year old A.C. On two occasions A.C. was spending the night at the defendant's home. On each occasion she awoke to find the defendant molesting her. BOA at 6.

The defendant was tried on four counts of child molestation first degree for the offenses committed against J.L. At his trial the State sought to introduce evidence of the sexual assaults against A.C. pursuant to RCW 10.58.090 and ER 404(b). The trial court rejected the evidence under ER 404(b) but found it admissible under RCW 10.58.090. BOA at 5-6.

III. ARGUMENT

A. THE LEGISLATURE DID NOT VIOLATE THE SEPARATION OF POWERS DOCTRINE WHEN IT ENACTED RCW 10.58.090.

The defendant argues that RCW 10.58.090 is unconstitutional because it violates the Separation of Powers Doctrine. He argues that the Court has the exclusive authority to

enact procedural rules, the rules of evidence are procedural, and therefore RCW 10.58.090, a statute which concerns the admissibility of certain evidence, violates the separation of powers doctrine because it directly conflicts with a rule of evidence promulgated by the Court. This syllogism is faulty for several reasons.

The Separation of Powers Doctrine derives from the division of government into three branches; executive, legislative, and judicial. Carrick v. Locke, 125 Wn.2d 129, 135, 882 P.2d 173 (1994). The doctrine is designed to prevent one branch of government from encroaching on the fundamental function of another branch. State v. Moreno, 147 Wn.2d 500, 505, 58 P.3d 265 (2002). The doctrine recognizes that there is some overlap between the branches of government. Fircrest v. Jensen, 158 Wn.2d 384, 393-94, 143 P.3d 776 (2006), cert. denied, 549 U.S. 1254, 127 S.Ct. 1382, 167 L.Ed.2d 162 (2007). When considering whether there has been a violation of the doctrine the Court considers "whether the activity of one branch threatens the independence or integrity or invades the prerogatives of another." Zylstra v. Piva, 85 Wn.2d 743, 750, 539 P.2d 823 (1975).

The defendant starts with the premise that there is a rigid division of labor between the legislative and judicial branches of government. The Court adopts rules of procedure and the Legislature adopts substantive law. This Court recognized that this is generally how the two branches of government function. Fircrest, 158 Wn.2d at 394. However, unlike some functions performed by those two branches of government, adopting rules of evidence is a function shared by both. Id. Only where the statute and court rule irreconcilably conflict will the court rule be given effect over the statute. Id.

This Court most recently recognized the Legislature's authority to codify or eliminate evidence rules that were either judicially created or which emanated from the common law in State v. Dow, 168 Wn.2d 243, 250, 227 P.3d 1278 (2010). The legislature may do so "to the extent it does not violate due process standards or other constitutional principles. Id.

When a challenge to the constitutionality of an evidence statute is raised on this ground, this Court has found no violation of the doctrine where the statute permits the trial court to admit or exclude evidence at its discretion. In Fircrest this Court considered whether SHB 3055, which amended the foundational requirements

for admissibility of breath tests in DUI prosecutions, violated the doctrine in light of ER 401, 402, 403 and 404(b). This Court reconciled the statute and the court rules by observing the statute was permissive; the trial court could still apply the rules of evidence to exclude the breath results. Id. at 399.

Similarly the Court found no violation of the doctrine in State v. Ryan, 103 Wn.2d 165, 691 P.2d 197 (1984). There this Court considered whether RCW 9A.44.120, permitting admission of child hearsay evidence, violated the doctrine because it conflicted with the hearsay rules. This Court found no violation because the hearsay rules contemplated legislatively enacted hearsay rules and because admission was dependant on the trial court finding particularized guarantees of trustworthiness. Id. at 178-79.

The defendant asks the Court to find Ryan does not support the conclusion that the doctrine is not violated because the Ryan Court built in permission for the Legislature to enact statutes governing admission of hearsay into the hearsay rules. Reply Brief of Appellant at 3. However, no such built in permission existed in the relevancy rules at issue in Fircrest. The key to reconciling statutes and evidence rules under the doctrine is whether the trial court may still exercise its discretion when applying the statute.

Here, because the trial court must still consider whether evidence of other sex offenses is admissible by applying ER 403 and other rules of evidence the Legislature has not unconstitutionally usurped the Court's function.

Other States have adopted statutes which similarly permit admission of prior sex offenses in a prosecution for either a sex offense or an offense committed with sexual motivation.[1]. One of those states, Michigan, has considered whether that State's laws which is similar to RCW 10.58.090 violates the separation of powers doctrine.

The Michigan Legislature passed MCL 768.27(a) in 2006. That statute permitted evidence of certain listed offenses when the defendant was accused of committing a listed offense against a minor. That statute permitted evidence which may have been inadmissible under MRE 404(b)[2]. State v. Wilcox, 761 N.W.2d 466, 468 (Mich. 2008), reversed on other grounds, 781 N.W.2d 784 (2010). The Court recognized that it had exclusive rulemaking power regarding matters of practice and procedure in the administration of the state's courts. Further, the Legislature had no

[1] See Fla. Stat. §90.404(2)(b); Ill. Comp. Stat. 5/115-7.3; La. Code Evid. Art. 412.2; Mich. Comp. Laws §768.27a; Okla. Stat. 12, §2413.

[2] This rule is virtually identical to ER 404(b)

authority to enact statutes which were purely procedural, and related to administration of justice. However, the Court found no violation of the separation of powers doctrine because the statute in issue was "a substantive rule of evidence and 'does not principally regulate the operation or administration of the court.'" Id at 468, quoting People v. Pattison, 741 N.W.2d 558 (Mich. 2007) and People v. Watkins, 745 N.W.2d 149 (Mich. 2007).

The Colorado Supreme Court reached a similar result to a separation of powers challenge in the context of another evidence statute in People v. McKenna, 585 P.2d 275 (Co. 1978). There the Court considered a challenge to C.R.S. 18-3-407, Colorado's "rape shield" law. Colorado Constitution Article VI, §21 gave the Supreme Court the authority to promulgate rules governing the administration of all courts and rules governing the practice and procedure in civil and criminal cases. Like the defendant here, McKenna argued the statute was a rule of procedure which invaded the court's rulemaking power. The court found the statute was neither purely substantive, and thus within the legislature's power, nor purely procedural, and thus within the court's rulemaking power. Id. at 277. The Court recognized the statute effectively declared a major public policy decision by the legislature that

victims of sexual assault should not be subjected to either psychological or emotional trauma as the price of their cooperation in prosecuting sex offenders. Id. at 278. Thus the statute was more than a legislative attempt to regulate the day to day procedural operations of the court. Because there was no rule which conflicted with the statute the Court performed its duty to reconcile the statute with court rules and found it was constitutional. Id. at 279.

The Washington Legislature has articulated the policy behind RCW 10.58.090 is to "ensure that juries receive the necessary evidence to reach a just and fair verdict." Laws of Washington 2008 Ch. 90, §1. Like the Colorado Court, this Court has recognized that it has a duty to reconcile evidence rules promulgated by both the Court and Legislature, if at all possible. Fircrest, 158 Wn.2d at 394. Here the Court can reconcile the statute and court rule because the statute is permissive and not mandatory. It carves out another exception to those already enumerated in ER 404(b) and other exceptions not specifically listed in that rule, such as lustful disposition. Given the flexibility built into the statute, it does not invade the court's prerogative. It does not violate the separation of powers doctrine.

B. RCW 10.58.090 DOES NOT VIOLATE THE EX POST FACTO PROVISION OF EITHER THE STATE OF FEDERAL CONSTITUTIONS.

Both the Washington Constitution and the Federal Constitution prohibit ex post facto laws. Washington constitution Article 1, § 23 states "[n]o bill of attainder, ex post facto law, or law impairing the obligations of contracts shall ever be passed." The Federal counterpart, Article 1, § 10 states "[n]o State shall...pass any Bill of Attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility."

The test for when a statute violates either provision was set out in Calder v. Bull, 3 U.S. 386, 3 Dall. 386, 1 L.Ed. 648 (1798). That case set out four factors which can result in an ex post facto law. Under the fourth factor a law is ex post facto when it "alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence in order to convict the offender." Id. at 390. The defendant argues RCW 10.58.090 is an ex post facto law because it fits within the definition of the fourth Calder factor.

Statutes run afoul of this portion of the test when they alter the quantum of evidence required in order to convict a defendant. Statutes do not violate this provision when they act only to permit a

trier of fact to consider evidence which was previously inadmissible. Thus, this Court held that a statute which made a witness competent to testify in a sexual assault prosecution for an offense which occurred before the effective date of the statute did not violate the prohibition against ex post facto laws. State v. Clevenger, 69 Wn.2d 136, 417 P.2d 626 (1966).

Courts from other states which have adopted statutes similar to RCW 10.58.090 have considered the argument that such statutes are ex post facto laws. One court stated that a retroactively applied change in the evidence rules does not create an ex post facto law simply because it works to a defendant's disadvantage. James v. State, 204 P.3d 793, 795. (Okla. 2009). The Court found that 12 O.S. Supp. 2007 § 2414 permitting other crimes evidence in a sexual assault prosecution was not ex post facto when those crime predated the effective date of the statute because the defendant's conviction for the current offense did not depend on whether the other crimes evidence was admissible. Id. at 795.

The Court found no ex post facto violation in Wilcox because the standard for obtaining a conviction had not changed; only the admissibility of prior conduct evidence had changed. Wilcox, 761

N.W.2d at 469. The Louisiana Court of Appeals found that States' version of the prior offense statute was not an ex post facto law for similar reasons in State v. Greene, 951 So.2d 1226, writ denied, 966 So.2d 571 (La. 2007). The Court reasoned "Article 412.2 did not alter the quantum of evidence required for a conviction but rather it simply expanded the type of evidence which may be introduced in the prosecution of certain sex offenses." Id. at 1232.

Washington Courts have also adopted the test set out in Calder when considering whether a statute violates the State constitutional prohibition against ex post facto laws. This Court did so most recently in Ludvigsen v. Seattle, 162 Wn.2d 660, 174 P.3d 43 (2007). The analysis employed by this Court is similar to that used in other states. If the statute does not affect evidence which is necessary to conviction, as in Clevenger, then it does it is not ex post facto. If it does affect the admissibility of evidence which is crucial to a conviction, as in Ludvigsen, then retroactive application of the statute is ex post facto.

The defendant urges the Court to find the ex post facto provision under the State Constitution is more protective than under the Federal Constitution. He does this in spite of his agreement that the test set out in Calder applies equally under the State

Constitution. Brief of Appellant at 35. He cites no authority which has held that Washington's ex post facto clause is more protective than its federal counterpart.

Instead the defendant urges the fourth Calder factor as applied to Washington Constitution Article 1, §23 has been interpreted to mean statutes which make convictions "more easy" are prohibited relying on Lybarger v. State, 2 Wash. 552, 560-61, 27 P. 449 (1891). That case does not support his argument that "more easy" means anything different when evaluating the state constitution rather than the federal constitution.

In Lybarger the defendant was charged with committing an offense which occurred before the State adopted its constitution. Before adoption the State was required to bring charges by indictment after a grand jury hearing. Afterwards the State could charge a defendant by information. The defendant argued application of the new charging procedure was an ex post facto violation relying on Kring v. State, 107 U.S. 221, 2 S.Ct 443, 27 L.Ed.506 (1883). This Court rejected the defendant's argument. In Kring retroactive application of the law at issue there resulted in excluding evidence which would conclusively establish the defendant's innocence of a higher grade of murder than when the

offense was committed. Lybarger, 2 Wash. at 559. In contrast the new charging procedure did not take away any available defense or reduce the State's burden of proof. Id. at 560. This Court's discussion in Lybarger demonstrates that this Court has not treated the Washington's ex post facto provision any differently than its federal counterpart.

IV. CONCLUSION

For the forgoing reasons, and the reasons stated in the Brief of Respondent, the State asks the Court to affirm the decision of the Court of Appeals.

Respectfully submitted on July 22, 2010.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: Kathleen Webber
KATHLEEN WEBBER WSBA #16040
Deputy Prosecuting Attorney
Attorney for Respondent